Supreme Court, U.S.
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No. 90-1427

In The

Supreme Court of the United States

October Term, 1990

MARILYN SLAY, as Widow and Surviving Spouse of JAMES ALBERT "BERT" SLAY, Deceased, MARILYN SLAY as Natural Mother and Next Friend of MELISSA F. SLAY and JAMES AARON SLAY, Minor Children of JAMES ALBERT "BERT" SLAY, Deceased, MARILYN SLAY as Personal Representative of the Estate of JAMES ALBERT "BERT" SLAY, Deceased, and JAMES H. SLAY and ANITA MAXINE SLAY, Surviving Parents of JAMES ALBERT "BERT" SLAY, Deceased,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any special circumstances exist to justify consideration of Plaintiff's argument that denial of lawyer-conducted voir dire pursuant to Rule 47(a) violates the Rules Enabling Act where that issue was never raised or litigated in the courts below.

2. Whether juror voir dire conducted by the court pursuant to Rule 47(a) in a diversity case abridges or modifies a substantive right in violation of the Rules Enabling Act.

3. Whether the trial court abused its discretion in conducting the voir dire examination of prospective jurors.

RULE 29.1 STATEMENT

The subsidiaries of Ford Motor Company required to be disclosed under Sup. Ct. R. 29.1 are listed in Appendix A.

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Respondent Ford Motor Company ("Ford") respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Tenth Circuit's decision in this case.

STATEMENT OF THE CASE

This product liability case was commenced in the United States District Court for the Northern District of Oklahoma. Federal court jurisdiction was based on diversity of citizenship, and Oklahoma substantive law applied to the claims and defenses of the parties.

Prior to trial, Plaintiff (the Petitioner in this Court) filed a written motion to allow her counsel to conduct the examination of prospective jurors. The motion was expressly based on Fed. R. Civ. P. 47(a) and upon the Seventh Amendment to the United States Constitution. (Documents 113 and 114)* Neither the motion itself nor the accompanying brief made any mention of voir dire practice in Oklahoma state courts. The district judge denied the motion in a pretrial order dated April 20, 1989. (Document 147)

Before the trial court began its voir dire examination, Plaintiff's counsel expressed concern about publicity concerning the "lawsuit crisis," and he asked the trial court to make sure that the jurors "put aside any type of prejudices or biases concerning our system of jurisprudence." (Trial Transcript at 10, quoted in the Petition at

* References are to the document numbers on the district court's docket sheet.

5-6) The trial court affirmed that he intended to select a jury that would fairly decide the case. (Trial Transcript at 11, quoted in the Petition at 6)

During voir dire, the trial court asked the parties if there were "any other areas that you want to pursue? I just want to know areas of inquiry you would like." Plaintiff's counsel said the "only thing" was "just the lawsuit question that I raised earlier," concerning "people that just felt like they couldn't return verdicts." (Voir Dire Transcript at 37-38) Plaintiff made no other requests.

Shortly thereafter, the court asked this question of the prospective jurors: "Do any of you have any religious beliefs or attitudes toward lawsuits that would oppose the filing of a lawsuit by anyone that could affect your view of this case?" (Voir Dire Transcript at 46) No juror responded. Plaintiff requested no additional questions and made no complaint that this inquiry was in any way inadequate.

Trial resulted in a verdict for Ford, and Plaintiff appealed to the United States Court of Appeals for the Tenth Circuit. Plaintiff argued, among other things, that denial of lawyer-conducted voir dire violated her right to a trial by a fair and impartial jury under the Seventh Amendment and the Oklahoma Constitution. Her complete argument on this issue is reproduced in Appendix C to the Petition, App. 24-25. Except for the bare citation to two Oklahoma authorities, Plaintiff made no argument that Oklahoma voir dire procedure applied in federal court.

Plaintiff also argued that the trial court's "refusal to ask requested voir dire" concerning tort reform violated

her right to a fair trial under the United States and Oklahoma constitutions. Her complete argument on this issue is also reproduced in Appendix C to the Petition, App. 25-26. In this portion of her brief, Plaintiff did not cite any ruling by the trial court denying any voir dire request.

The Tenth Circuit rejected as "meritless" Plaintiff's argument that lawyer-conducted voir dire is constitutionally required. (Petition, App. 17) With regard to the voir dire which Plaintiff claimed to have requested, the Tenth Circuit correctly noted that Plaintiff in her brief had failed to state where in the record the issue was raised and ruled upon, as required by local rule. (Petition, App. 17) The Tenth Circuit further noted that the record "strongly suggests the Plaintiff got the inquiry she wanted." (Petition, App. 18)

REASONS FOR DENYING THE WRIT

I.

PLAINTIFF'S ARGUMENT BASED ON THE RULES ENABLING ACT WAS NOT RAISED OR LITIGATED IN THE LOWER COURTS

Plaintiff's first argument is that Fed. R. Civ. P. 47(a), which allows the trial court to conduct voir dire, abridges or modifies a "substantive right" to lawyer-conducted voir dire which Plaintiff claims is granted by Oklahoma rules of procedure. Therefore, Plaintiff claims, the Rules Enabling Act, 28 U.S.C. § 2072, and this Court's decisions in *Hanna v. Plumer*, 380 U.S. 460 (1965) and *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), required the trial court to

follow the Oklahoma procedure and allow voir dire conducted by the lawyers.

This issue was never raised below, either in the trial court or in the Tenth Circuit. Plaintiff's motion in the trial court was filed pursuant to Rule 47(a) and in support cited only the rule itself and her right to a jury trial under the Seventh Amendment to the United States Constitution. Oklahoma voir dire procedure was never mentioned. In the Tenth Circuit, similarly, Plaintiff's only argument was based on her right to a jury trial under the state and federal constitutions. Plaintiff never even cited the Rules Enabling Act or this Court's decisions in *Hanna* or *Erie*.

This Court ordinarily will not decide questions not raised or litigated in the lower courts. *E.g. Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L.Ed.2d 219, 239 (1989); *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Plaintiff has cited no special circumstances which would justify departure from this general rule.

II.

RULE 47(a) DOES NOT ABRIDGE OR MODIFY ANY SUBSTANTIVE RIGHT

Even if the issue had been properly raised, it is not one which is worthy of this Court's attention.

First, there is no serious conflict between Rule 47(a) and the corresponding Oklahoma rule of procedure. Rule 47(a) permits the trial court to conduct voir dire itself or to allow attorneys to do so. If the court conducts voir dire itself, the court "shall" permit parties or attorneys to

"supplement" the examination by such further inquiry as it deems "proper" or shall submit such additional questions requested by the parties as it deems proper. Rule 6 of the Rules for District Courts of Oklahoma similarly provides that the court initiates voir dire but "shall" permit the parties or their attorneys a "reasonable opportunity" to "supplement" such examination. Under both rules, "[t]he manner and extent of examination of jurors rests in the sound discretion of the trial judge." *Strube v. State*, 739 P.2d 1013, 1015 (Okla. Crim. App. 1987); *accord, e.g., Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981).

Even assuming a significant conflict between the two rules, Rule 47(a) applies in federal courts provided that it does not abridge or modify substantive rights in violation of the Rules Enabling Act (and providing, of course, that it does not transgress any federal constitutional provisions). *See Hanna*, 380 U.S. at 469-474; *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 8 (1987). As this Court recently observed,

> [A]ny Rules Enabling Act challenge to [a federal rule of procedure] has a large hurdle to get over. The Federal Rules of Civil Procedure are not enacted by Congress, but "Congress participates in the rulemaking process." . . . Additionally, the Rules do not go into effect until Congress has had at least seven months to look them over. . . . A challenge . . . can therefore succeed "only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions."

Business Guides, Inc. v. Chromatic Communications Enterprises, 111 S.Ct. 922, 59 U.S.L.W. 4144, 4150 (1991). Further, "Rules which incidentally affect litigants'

substantive rights do not violate this provision if reasonably necessary to maintain the integrity of the system of rules." *Id.*, quoting *Burlington Northern*, 480 U.S. at 5.

Here, as in *Business Guides*, "there is little doubt that [the rule in question] is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental" 59 U.S.L.W. at 4150. In fact, the goal of a properly conducted voir dire is to select a fair and impartial jury; this goal remains the same regardless of who conducts the voir dire. Therefore, assuming that voir dire is properly conducted, the question of who conducts it should not affect any substantive rights at all, even indirectly. *Perry v. Allegheny Airlines, Inc.*, 489 F.2d 1349, 1351-1352 (2d Cir. 1974) (Rule 47(a) is "essentially 'housekeeping' in nature" and does not transgress the terms of the Rules Enabling Act).

There is no conflict in the courts on this point and no issue of sufficient importance to merit review by this Court.

III.

THE CONDUCT OF VOIR DIRE EXAMINATION IS WITHIN THE DISCRETION OF THE TRIAL COURT

Plaintiff's second argument is that her right to a trial by an impartial jury was violated because the trial court (1) denied her request for lawyer-conducted voir dire and (2) denied her requested voir dire questions. This issue is a combination of the two separate issues which Plaintiff raised in the Tenth Circuit.

The Tenth Circuit correctly observed that the first of these claims was "meritless." (Petition, App. 17) In fact, in earlier cases it had rejected similar arguments as "frivolous." *United States v. Grismore* 546 F.2d 844, 848 (10th Cir. 1976). Plaintiff's argument that lawyer conducted voir dire is constitutionally required is entirely lacking in authority.

Plaintiff's claim that her right to a jury trial was violated because the trial court failed to ask questions concerning the "lawsuit crisis" is equally meritless. As the Tenth Circuit noted, the trial court asked the *only* question requested by Plaintiff at the time of trial: whether the jurors had any "religious beliefs or attitudes toward lawsuits that would oppose the filing of a lawsuit by anyone that could affect your view of the case."*

In this Court, Plaintiff for the first time suggests that this question might have been interpreted to mean "religious beliefs or religious attitudes toward lawsuits." (Petition at 14) But Plaintiff at trial *never* objected to the language selected by the trial court and *never* requested any additional or follow-up questions.

The trial court is vested with wide discretion in the conduct of voir dire, and that discretion should not be disturbed absent a clear showing of abuse. *E.g. Rosales-Lopez v. United States,* 451 U.S. 182, 189 (1981); *United*

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* Four months prior to trial, Plaintiff also submitted a list of about 30 "suggested" voir dire questions. (Document 112) At the time of trial, however, Plaintiff never mentioned this list and never specifically requested that the trial court ask any of the suggested questions. Thus, the trial court never ruled on any of these "suggestions."

States v. Chalan, 812 F.2d 1302 (10th Cir. 1987), *cert. denied* 488 U.S. 983 (1988). The trial court here plainly did not abuse its discretion in asking the only question requested by Plaintiff at trial in language which Plaintiff herself apparently found acceptable at the time.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

United States of America

American Renaissance Insurance Company
Autolatina America, Inc.
Dearborn Capital Corporation
Dobco Life Insurance Company
Fairlane Life Insurance Company
Ford Holdings, Inc.
Jaguar Cars Inc.
Lincoln-Rowe Management
Shoppers Mart, Inc.
The Hertz Corporation

Argentina

Autolatina Argentina S.A. de Ahorro Para Fines Determinados
Invercred Compania Financiere S.A.
Jaguar Holdings Limited
Transax Sociedad Anonima, Comercial Industrial y Financiera
Volkswagen Inversiones S.A.
Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

Australian Road Credit Limited
Ford Credit Australia Limited
Ford Credit Australia Wholesale Limited
Ford Motor Company of Australia Limited
Ford New Holland Australia Limited
Ford Sales Company of Australia Limited

New Holland Holdings Pty., Limited
Oscrite Limited

Austria

Ford Bank Aktiengesellschaft
Ford Motor Company (Austria) K.G.

Belgium

Ford Credit N.V.
Ford Motor Company (Belgium) N.V.
Ford Tractor (Belgium) Limited

Brazil

Apolo – Administradora de Bens S/C Ltda.
Autolatina Distribuidora de Titulos e Valores Mobiliaros Ltda.
Autolatina Financiadora S.A. – Credito, Financiamente e Invest.
Autolatina Leasing S/A – Arrandamente Mercantil
Autolatina Previdencia Privada
Autolatina S.A.
Consorcio Nacional Ford Ltda.
Consorcio Nacional Volkswagen Ltda.
Ford Brasil S.A.
Ford Distribuidora de Productos de Petroleo Ltda.
Fundacao Autolatina
Inter-Locadora S/A
Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
Transglobal Corretagen de Seguros Ltda.
Volkswagen de Brasil S/A
Volkswagen Factoring – Fomento Comercial S/A

Canada

Canadian Road Credit Company
Ford Credit A/S
Ford Credit Canada Limited
Ford Motor Company of Canada, Limited

Halla Climate Control Canada, Inc.
Jaguar Canada, Inc.

Denmark

Ford Motor Company A/S
Ford New Holland Scandinavia A/S

England

Aston Martin (RDP) Limited
Aston Martin Finance Limited
Aston Martin Lagonda Design Limited
Aston Martin Lagonda Limited
Aston Martin Lagonda U.S.A., Inc.
Aston Martin Sales Limited
Auto Club International Limited
Automotive Finance Limited
Ford Automotive Leasing Limited
Ford Motor Company Limited
Ford Personal Import Export Ltd.
Jaguar Cars Exports Limited
Jaguar Cars Limited
Jaguar Insurance Limited
Jaguar International Finance Ltd.
Jaguar Limited
Jaguar Sports Limited
Lagonda Properties Limited
The Jaguar Collection Limited
Venture Pressings Limited

Finland

Oy Ford Ab

France

Ford France S.A.
Ford New Holland S.A.

Germany

Ford Versorgungs-Und
Unterstutzungseinrichtung GmbH

Holland

Ford Nederland B.V.

Mexico

Implementos Agricolas Mexicanos, S.A.
ACONA B.V.

New Zealand

Ford Motor Credit Company of New Zealand Limited

Norway

Ford Motor Norge A.S.
Ford New Holland A/S

Philippines

Ford Philippines, Inc.

Puerto Rico

Puerto Ricancars, Incorporated

Sweden

Ford Credit AB
Ford Motor Company Aktiebolag

Switzerland

Ford Credit S.A.

Taiwan

Ford Enterprise Company Taiwan, Ltd.
Ford Taiwan Services, Limited
Oy Ford Credit Rahoitus
Transcon Insurance Limited